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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1981

SWIFT AGRICULTURAL CHEMICALS CORPORATION,

Petitioner,

vs.

FARMLAND INDUSTRIES, INC., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

Given that a court in one circuit is not bound by an earlier decision of a court in another circuit, what, if any, respect should be paid to that earlier decision?

Are the holdings of the Fifth Circuit Court of Appeals and the District Court for the Eastern District of Louisiana as to the scope, validity and infringement of U.S. Patent No. 3,464,808 correct or are the directly conflicting holdings of the Tenth Circuit Court of Appeals below correct?

Is it a denial of procedural due process for a Court to adjudicate a claim that was not presented to it?

LIST OF PARTY TO THE PROCEEDINGS WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Pursuant to Rules 21.1(b) and 28.1 of this Court, Petitioner Swift Agricultural Chemicals Corporation states that its name has been changed from Swift Agricultural Chemicals Corporation to Estech, Inc., that the parent of Estech, Inc. is ESMARK, Inc., and that Estech, Inc. has three partially owned subsidiaries, viz. Consolidated Fertilizers Limited (Australia), Montan Transport USA (New York), and Yong Nam Chemical Company, Ltd. (Korea).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Swift Agricultural Chemicals Corporation, respectfully prays that a writ of certiorari issue to review the judgment entered on March 25, 1982, by the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 674 F.2d 1351 and is reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 25, 1982. The jurisdiction of this Court arises under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is one of three patent infringement suits brought by the Petitioner, Swift Agricultural Chemicals Corporation, on its U.S. Patent No. 3,464,808 for an invention of a process for making ammonium polyphosphate, a liquid fertilizer. The first case, *Swift* v. *Usamex,* was tried before the United States District Court for the Eastern District of Louisiana in 1976. That Court held the patent valid, enforceable and infringed, and enjoined further infringement by Usamex. (App. C) Usamex filed a Notice of Appeal but while it was pending, the parties settled the case; Usamex paid $1,383,000.00 for past infringement and attorney fees and took a license under which it has additionally paid more than $480,000.

After conclusion of the Usamex litigation, Swift brought two other suits on the same patent; the present one against Farmland Industries, Inc. and Farmers Chemical Company in the District of Kansas, and one against Mississippi Chemical Company in the Southern District of Mississippi. Extensive discovery was had in each case and by early 1980 each case was awaiting a trial setting.

In the meantime, Usamex sought relief from the judgment against it under Rule 60(b). Usamex asked for the return of the million dollars, on the grounds that it had "newly discovered evidence," establishing non-infringement. Usamex further prayed for a declaratory judgment that it did not infringe Swift's patent and, accordingly, owed no royalties under the license. Usamex contended that it had performed post-trial tests which established that the time that the chemicals remained in the reactor pipe was at least 3 seconds and, since the patent claims

called for a residence time of less than one second, Usamex did not infringe with either its newly modified process or the adjudicated process.

Swift, in essence, demurred, maintaining that any such new tests were irrelevant, that the patent claims had to be interpreted in light of the patent specification and the understanding that those skilled in the art would have ascribed to it at the time of the application for patent. The District Court agreed, interpreting the claims as calling for a one second residence time to be determined by calculating the time that the steam, generated by the violent chemical reaction, remained in the reactor pipe and rejecting as immaterial to the issue of infringement evidence as to how long the chemicals remained in the reactor pipe. Both the Rule 60(b) Motion and the declaratory judgment were, accordingly, dismissed. (App. D)

The present case was tried but not decided before this second decision in *Usamex*. With full awareness of both the second and the prior Usamex decisions, the Kansas District Court held to the contrary, *i.e.*, that the Swift patent was invalid and not infringed. (App. B) As grounds for its holding of invalidity, the Kansas Court held that there was nothing new or novel in the patented invention (35 U.S.C. 102) and, further, even if there were, the invention would have been obvious (35 U.S.C. 103). The prior art on which the Kansas Court relied had been presented to and considered by the Louisiana District when it held the patent valid, and most of such art had been considered by the United States Patent

Office when it granted the patent.* One of the grounds for non-infringement was that the chemical reactants remained in the reactor for more than one second.

The Court also held all of the seven claims of the patent invalid, even though Swift had asserted only claims 1, 2 and 4, and the defendant had acknowledged that those were the only claims in issue.

Following the Kansas Court's holding of invalidity, Mississippi Chemical moved for summary judgment in the Mississippi Court, contending that Swift was collaterally estopped from asserting the patent once the patent had been held invalid by one court, even though another court had held the patent valid, citing *Blonder-Tongue Labs* v. *University of Illinois Foundation*, 402 U.S. 313 (1971) and *Blumcraft of Pittsburgh* v. *Kawneer Company, Inc.*, 482 F.2d 542 (5 Cir. 1973). The parties then stipulated to stay that case pending the outcome of this one.

In the meantime, Usamex appealed the dismissal of the declaratory judgment action and Rule 60(b) Motion, contending that the District Court had not correctly construed the patent in holding that the time that the chemicals were in the reactor was immaterial to infringement. The Fifth Circuit Court of Appeals disagreed. It affirmed on the basis of the Opinion of the District Court in Louisiana. (App. E)

After the Fifth Circuit decision, the Tenth Circuit heard and decided this, the Kansas case, affirming the District Court. (App. A) As did the lower court, the

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* Pursuant to 35 U.S.C. § 282, "A patent shall be presumed valid.", a statutory presumption not even mentioned by the Kansas District Court.

Tenth Circuit Court of Appeals held the patent invalid based on the same prior art that had been before the Louisiana Court when it upheld the validity of the patent. The Court held that the patented invention was the same as, i.e., was anticipated by (35 U.S.C. 102), the prior patents to Young and Getsinger and the rejected patent application of Lutz-Rubio. While the Fifth Circuit's decision construing the patent was cited, no attempt was made by the Tenth Circuit to explain its contrary construction of the patent. The sole attempt at distinguishing the validity holding of the Louisiana District Court is the statement that (p. 19) "The Lutz and Rubio application was not before Judge Sear." Unmentioned at this point of the opinion is the fact that Lutz and Rubio were not granted a patent because the Patent Office determined that they had claimed the same invention as in a Bookey patent, but that the Bookey invention was first. The Bookey patent was before and considered by the Louisiana District Court.

On the infringement issue, the Court below adopted the District Court's reliance on tests which were found to show that the chemicals remained in the reactor for more than one second and ruled that this avoided infringement.* No explanation was offered as to why the Court made this holding which is in direct conflict with the Fifth Circuit Court of Appeals' holding that such evidence is immaterial to the infringement issue. In fact, the Fifth Circuit's decision was not even discussed.

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*The other basis for non-infringement was that Farmland used "superphosphoric acid" rather than "phosphoric acid having a P_2O_5 content of about 68%" as called for by the patent claims. Defendants' own witnesses admitted that superphosphoric acid is a type of phosphoric acid and that the acid defendants used had a P_2O_5 content of 68%.

Regarding the patent claims that were not in issue but were nevertheless adjudicated as invalid, the Court said they were in issue because "Farmland's answer brought up the defense of the patent's invalidity."* No recognition was given by the Court to the fact that Swift had asserted only claims 1, 2 and 4, that no evidence or arguments were presented by either party pertaining to the remaining claims of the patent, and that defendants, in their post trial brief, stated "The claims at issue read as follows . . .," quoting claims 1, 2 and 4.

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* It is common in generally talking about patents to refer to the patent as valid or invalid, infringed or not infringed, but it is the individual claims, not the patent, that are valid or invalid, infringed or not infringed. "[E]ach claim of a patent must be considered separately and each must stand or fall alone . . ." *Maloney-Crawford Tank Co.* v. *Sauder Tank Co.*, 465 F.2d 1356, 1365 (10 Cir. 1972).

REASONS FOR GRANTING THE WRIT

I.

A Conflict Between The Circuits

The decision of the Court below is in direct conflict with the decision of the Fifth Circuit in the *Usamex* case, and is also in direct conflict with the earlier decision on patent validity and infringement of the Louisiana District Court in the *Usamex* case. That these conflicts should be resolved by this Court is the subject of the next section. The more crucial question, however, arises not from the conflict itself but rather from the manner in which the second court, the Court below, treated — or as it were, did not treat — the decision of the first court.

The issue is: given that a court of one circuit is not bound by an earlier decision of a court of another circuit, what, if any, respect should be paid to that earlier decision?

There is a direct conflict amongst the circuits. It ranges from the approach in *Maple* v. *Citizens National Bank*, 437 F.Supp. 66, 68 (W.D. Okla. 1977) that:

> ". . .this Court must consider the (other) Circuit ruling as substantially binding and should whenever possible follow the decision of a court of appeals of a sister circuit.";

to the approach in *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073, 1076 (9 Cir. 1970) where the Court said nothing more than:

> "We disagree with the contrary conclusion on the standing issue reached by the Second Circuit.";

to the approach in *United States* v. *Booth*, 399 F.Supp. 975 (C.D. S.C. 1975) where the Court said:

> ". . . this court need not attempt to justify deviation from the rule announced by the Fifth Circuit."; and

to the approach of the Tenth Circuit below of not even mentioning that there was a conflicting decision of the Fifth Circuit.*

The conflict is important and calls for the guidance of this Court.

Probably the single most pressing problem facing the bench and the bar today is the proliferating amount of litigation. Solutions have been suggested from many quarters, new judges have been added, portions of the bar have been rebuked for litigiousness, yet the problem remains, indeed, it worsens.

One cause of the problem is unpredictability. In recent years, little if any regard has been given to stare decisis, comity, and the whole notion of uniformity and predictability of the law. A lawyer cannot counsel his client with much assurance as to the likely outcome of possible or pending litigation; even that involving issues already litigated. Courts all too often will ignore or circumvent precedents, rules or statutes in order to arrive at a decision in favor of the "felt" victor. The "law" becomes *ad hoc*, i.e., the absence of law.

The recently decided case of *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, ... U.S. ..... (Nos. 80-2182 and 81-11, decided June 1, 1982) provides a striking example. There, this Court reversed the Second Circuit's

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* One wonders how often opinions simply fail to mention precedents which cannot be distinguished.

reversal of the district court on the sole ground that the Second Circuit had not accorded the required weight to the District Court's fact findings. Yet, that fundamental rule — a touchstone of appellate authority — was not raised by any of the six petitioners or five Amici Curiae supporting the petitioners. Nor was that issue raised by petitioners in their earlier petition for rehearing to the Second Circuit Court of Appeals.*

Inwood issued a clear admonition regarding the deference to be accorded to factual determinations of trial courts by courts of appeal. That admonition, when followed, will promote greater uniformity and predictability in the law and eventually will be reflected by lawyers counseling their clients to forego appeals where the trial courts' decision rests on fact determinations which are not clearly erroneous.**

The present case provides this Court with another opportunity to foster the objective of uniformity and predictability. The cases quoted above demonstrate that the courts are in conflict and are in need of guidelines as to what respect, if any, to give to precedents of

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* The point referred to in Justice White's concurring opinion (footnote 1) pertaining to Darby's raising the issue of function ability and Rule 52(a) was also raised in the petitions for rehearing in the Second Circuit.

** A graphic illustration of this is found in the negligence practice in the state courts in Chicago. The bar knows that the appellate court consistently adheres to the rule that a jury verdict will be overturned only where the verdict is "against the manifest weight of the evidence." Appeals are rarely taken.

courts in other circuits.* This Court should speak to that issue.

Without such guidance, the court below felt no necessity even to advance reasons why its legal construction of the patent in suit was preferred to the earlier construction of the Fifth Circuit Court of Appeals. Indeed, it felt no compulsion to even discuss the Fifth Circuit decision which was in direct conflict with its own. To countenance a court's ignoring a precedent of another circuit that is directly on point, is to further advance the notion that each court has free rein to rule as it will, unbridled by the law and prior holdings on identical issues.

This case also raises the same question as to the effect of the precedents of district courts. Thus: what respect, if any, should be accorded by a circuit court or by a district court to a precedent rendered by a district court in another circuit? The Court of Appeals below ackowledged the Louisiana District Court decision holding the patent valid but failed to acknowledge that the validity holding was made with respect to the same prior art as that on which the Court below held the patent invalid. In short, the earlier opinion was totally ignored and no reasons were offered by the Court below as to why it

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* Additional examples of the conflicting treatment accorded precedents of other circuits are legion. See, *e.g., Bros Incorporated* v. *W. E. Grace Manufacturing Company*, 351 F.2d 208, 210 (5 Cir. 1965); *United States* v. *Nickles*, 502 F.2d 1173, 1176-1177 (7 Cir. 1974); *United States* v. *Mitchell*, 432 F.2d 354, 356 (1 Cir. 1974); *Aldens* v. *Miller*, 610 F.2d 539, 541 (8 Cir. 1979); and see Vestal, Relitigation By Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies, 55 N.C. L. Rev. 127 (1977).

arrived at a contrary holding. Similarly, with regard to the District Court below, it also gave scant consideration to the opinion of validity and did not even mention the Louisiana Court's second opinion construing the patent.

Ironically, this Court in *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938) and its progeny, has provided instructions as to how federal courts are to treat the precedents of the various levels of state courts in diversity cases, but has not provided similar instruction as to a federal court's treatment of precedents of other federal courts.*

The twin objectives of *Erie R. Co.* of promoting uniformity — "The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court"** and avoiding "forum

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* After *Erie R. Co.* overruled *Swift* v. *Tyson,* 16 Pet. 1 (1842) and held that federal courts sitting in diversity cases are bound by the decisions of the highest court of the appropriate state, the question arose as to what respect, if any, should be given to the precedents of the lower state courts. This Court responded by holding in three cases that federal courts are bound by decisions of a state's intermediate appellate courts "unless there is persuasive evidence that the highest state court would rule otherwise" *King* v. *Order of Travelers,* 333 U.S. 153, 158 (1948); *Six Companies* v. *Highway District,* 311 U.S. 180 (1940); *West* v. *American T&T Co.,* 311 U.S. 223 (1940); *Stoner* v. *New York Life Ins. Co.,* 311 U.S. 464 (1940) and later in two other cases that the respect that should be given to state trial court decisions was commensurate with that given such decisions by the state's courts *Fidelity Union Trust Co.* v. *Field,* 311 U.S. 169 (1940); *King* v. *Order of Travelers, supra* at 158.

** *Hanna* v. *Plumer,* 380 U.S. 460, 467 (1965).

shopping" — are equally applicable here and afford an additional reason for granting the writ.

The conflict should be resolved.

II.

A Second Conflict Between The Circuits

Certiorari should also be granted to resolve the conflict between the decision below and that of the Fifth Circuit Court of Appeals in the *Usamex* case. The decision below is also in direct conflict with the earlier unappealed decision of the Louisiana District Court.

The patented invention is for a process for making liquid ammonium polyphosphate. As the District Court below found: prior to the invention, "those skilled in the art were aware of a problem urgently in need of resolution" (App. B at 1301). That awareness and the urgency are reflected by the research and development efforts conducted in the nine years before the invention at TVA's National Fertilizer Development Center; at Dorr-Oliver, Inc.; at Union Oil Company of California; and at Usamex Fertilizers, Inc. The net result was failure. None developed a process for commercially producing ammonium polyphosphate.

Swift's inventor, Tommy Carter Kearns, found the way. Others soon followed. TVA, "the dominant force in liquid fertilizer research" (App. C at 25), on learning of Kearns' invention, redirected its efforts and quickly had the solution that had so long eluded it. In turn, TVA was a guide to others: Usamex, Mississippi Chemical and Farmland. The solution to the problem that had been so "urgently in need of resolution" quickly paid dividends in the marketplace. In the past 12 years, Usamex alone has sold over 100 million dollars of ammonium polyphosphate made by the patented process.

At the time that the Court below was considering the validity and infringement of the Kearns patent, it was not writing on a clean slate. The United States Patent Office had determined that Kearns' invention was entitled to a patent. The Louisiana District Court, in a thorough opinion, held the patent valid and infringed by Usamex.* In *Usamex II*, the Fifth Circuit Court of Appeals affirmed the construction of the patent placed on it by the Louisiana Court — the same construction on which the patent had earlier been held valid.

With this background, one would think that the Kansas District Court and the Tenth Circuit Court of Appeals would have begun the inquiry by asking Farmland: "What new evidence do you have? Why are the Patent Office, a District Court and a Court of Appeals all wrong?" These questions were not asked and no answers were given.

Rather, the Court below, as did the District Court before it, approached the issues as if they were fresh new issues, as if nothing had gone on before. It found the patent invalid on the grounds that the invention had already been made by Getsinger (of TVA); by Lutz and Rubio (of Dorr-Oliver); and by Young (of Union Oil Company of California). The very failures that had weighed in favor of patentability in the analysis of the Louisiana Court were elevated to the status of prior invention by the Tenth Circuit.**

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* In an affidavit later filed in the Mississippi Chemical case, Usamex's attorney stated that Usamex had paid over $600,000 in attorney and expert fees in its preparing its defenses to the case.

** It is curious that while the Tenth Circuit and the Kansas District Court held that the Kearns invention was earlier made by Getsinger, Young and Lutz/Rubio,

The crucial divergence between the Courts below and the Fifth Circuit Courts is the residence time element of the Kearns' process. The Fifth Circuit recognized that Kearns had discovered that in order to succeed in producing ammonium polyphosphate, the process had to take place very rapidly, i.e., in "less than one second." No one had previously recognized this. Getsinger, of TVA, stirred the reactants in consecutive tanks and taught in his patent employing a residence time of 1 to 180 minutes. Young, of Union Oil, taught in his patent the use of a three-step process using a complex tubular structure depicted in Figure 8 of his patent. No residence time was specified and he admitted that he had never constructed the device.*** The Lutz/Rubio patent application was rejected by the Patent Office in an interference proceeding with Bookey. Bookey teaches a reaction time of one hour.****

** (Continued)

the Patent Office issued patents to Getsinger and Young and would have issued one to Lutz/Rubio had it not determined that Bookey had made the Lutz/Rubio inventions earlier, and then, while knowing all this, the Patent Examiner issued a patent to Swift's Kearns.

*** Notwithstanding this admission, the opinion of the Court below states that the apparatus "was in fact built and operated" (App. A at 932).

**** When two copending patent applications are deemed by the Patent Office to claim the same invention, it declares an interference to deterimne which applicant made the invention first. In this instance, the Patent Examiner declared the interference between the Lutz/Rubio application and the Bookey application and ruled that Bookey had made the invention first. It is telling that a few days after declaring the interference, the same Examiner granted the patent in suit to Kearns.

Yet, the two courts below found that each of Getsinger, Young and Lutz/Bookey taught residence times of less than one second and therefore each of their process was the same as, i.e., anticipated (35 U.S.C. 102), the Kearns patent in suit. This striking conclusion was not drawn from the various patents — as it obviously could not have been — but from testimony of the three workers given during this litigation almost 20 years after the fact. Ignored by the Court below were the law, the facts and the decision in the Fifth Circuit and the Patent Office.

The Court ignored the law laid down by this Court nearly a century ago in *The Barbed Wire Patent*, 143 U.S. 275 (1892):

> "Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information. The very fact, which courts as well as the public have not failed to recognize, that almost every important patent, from the cotton gin of Whitney to the one under consideration, has been attacked by the testimony of witnesses who imagined they had made similar discoveries long before the patentee had claimed to have invented his device, has tended to throw a certain amount of discredit upon all that class of evidence, and to demand that it be subjected to the closest scrutiny. Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defense of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer. . . ."

The Court below further ignored the teachings of the prior art patent documents which clearly show that none of the inventors recognized that the key was a short residence time; that each of these workers failed to achieve a commercially workable solution to the problem; and that the Patent Office deemed each of these approaches as patentably distinct, granting patents to Getsinger, Young and Bookey and then, with knowledge of the three, granting the patent in suit to Kearns.

Also ignored were the decisions in the Fifth Circuit in which the criticality of the short residence time was recognized, and in which the patent was held valid over the very same art that was before the Tenth Circuit. Notwithstanding this direct conflict, the Court below makes no real attempt to justify its contrary conclusion.*

Finally, having construed the patent in suit one way to hold the patent invalid, the Court below construed it another way to find no infringement. It held (App. A at 3) that Farmland's tests pertaining to the time the chemical reactants remained in the pipe proved that Farmland's process had a residence time of greater than one second. This is in direct conflict with the Fifth Circuit Court of Appeals decision that the time that the reactants remain in the reactor is immaterial to the issue of infringement. The Court below said not a word as to the conflict, gave no reason for its contrary decision, and made no attempt to explain why it disagreed with the holding of the Fifth Circuit Court of Appeals.

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* Its statement (App. A at 19) that "the Lutz and Rubio application was not before Judge Sear" does not stand. The Bookey patent, which as the Patent Office ruled taught the same invention of Lutz and Rubio, was before the Louisiana Court.

III.

A Denial Of Due Process

In arguing the *Dartmouth College* case before this Court, Daniel Webster declared that by due process of law is meant "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." *The Trustees of Dartmouth College* v. *Woodward*, 17 U.S. 518, 581.

In the present case, valuable patent property rights were condemned as worthless, even though the Tenth Circuit Court of Appeals and the trial court below heard nothing, made no inquiry, and provided no trial as to those property rights.

The facts, as shown, are straightforward. Swift charged defendants with infringing claims 1, 2 and 4 of the patent in suit. (Swift's Pre Trial Proposed Findings of Fact No. 60) The case went to trial on those three claims, no evidence was proffered as to the remaining four claims of the patent (claims 3, 5, 6 and 7) and no arguments were advanced as to them. In short, no issue, evidence or argument was presented as to claims 3, 5, 6 and 7.

The Tenth Circuit below offered two reasons in support of its affirmance, holding these claims invalid. Neither is sound.

The Court stated that since the four claims were dependent upon claims 1 and 2, they "could not stand alone as patentable inventions." That is not the law: it is settled in the Patent law that "each claim of a patent must be considered separately and each must stand or

fall alone." *Maloney-Crawford Tank Corp.* v. *Sauder Tank Co.*, 465 F.2d 1356, 1365 (10 Cir. 1972); *Leeds & Catlin* v. *Victor Talking Machine Co.*, 213 U.S. 301, 319 (1909); *Timely Products Corporation* v. *Arron*, 523 F.2d 288, 296 (2 Cir. 1975). Moreover, and obviously more crucial, that is not the point: the question is whether the issue was before the Court—whether due process was accorded — not whether the Court may or may not have correctly decided the matter not before it.

As to that question, *i.e.*, whether the issue was before the Court, the only basis offered by the Tenth Circuit in support of its holding that the issue was presented was that (p. 19) "Farmland's answer brought up the defense of the patent's invalidity." An Answer to a Complaint, however, cannot raise an issue as to patent claims not asserted to infringe by the patent owner. "A court may not pass upon the validity of claims which were not put in issue, either by a claim of infringement or by a counterclaim for declaration of invalidity." *Timely Products Corporation* v. *Arron*, 523 F.2d 288, 296 (2 Cir. 1975); *Felburn* v. *New York Central Railroad Co.*, 350 F.2d 416, 420 (6 Cir. 1965).

Further, it is clear that the parties knew, and the trial court should have known, that only claims 1, 2 and 4 were in issue. No evidence or arguments were presented as to the remaining claims and, if any doubt remained, each of the parties explicitly pointed out in its post trial submissions that only claims 1, 2 and 4 were involved. Defendants spelled out in their Post-Trial Brief: "The claims at issue read as follows: . . ." and claims 1, 2 and 4 were then quoted.

The deprivation of property by a United States Court of Appeals is such a fundamental violation of the Con-

stitutional right to procedural due process that it presents one of those rare cases in which the lower court (Supreme Court Rule 17):

> ". . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."*

The writ should issue.

CONCLUSION

The two conflicts between the circuits and the denial of due process present issues to which this Court should speak.

A writ of certiorari to the Tenth Circuit Court of Appeals is respectfully sought.

Respectfully submitted,

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* It is noted that in the still pending case in Mississippi, the defendant has filed a motion for summary judgment contending that Swift is collaterally estopped to assert any of the patent claims under the doctrine of *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313 (1971). One of the patent claims that was not in issue in the Kansas case is asserted to be infringed by Mississippi Chemical.